



**South Coast
AIR QUALITY MANAGEMENT DISTRICT**

21865 E. Copley Drive, Diamond Bar, CA 91765-4182 (909) 396-2000

February 25, 1994

Felicia Marcus, Regional Administrator
U.S. Environmental Protection Agency
Region IX
75 Hawthorne Street
San Francisco, California 94105-3901

Re: District Rule 201 (Permit to Construct Requirement)

Dear Ms. Marcus:

As you know, EPA recently disagreed with the SCAQMD's policy regarding the types of activities that may take place prior to issuance of a permit to construct. In response, the District prepared a draft revised interpretation of Rule 201, the requirement to obtain a permit to construct, which was submitted to your staff for comments. By letter dated December 3, 1993, your staff commented that the District's draft revised interpretation is contrary to EPA's interpretation of federal law. I am writing to ask you to reconsider this position. We believe that EPA's position is not mandated by federal statutes or regulations. Moreover, since receiving your December 3 letter, we have obtained information indicating that EPA's position is inconsistent with the interpretation of these same requirements by numerous local air pollution agencies.

As background, this issue arose when the District informed Chevron U.S.A., Inc. that it could place new refinery equipment at its final location prior to obtaining a permit to construct as long as the procedure of making utility and process connections was not commenced. Chevron thereafter was cited by EPA for constructing without a permit in violation of Rule 201, the permit to construct requirement which is included in the California SIP. At the time of the citation, I understand that Chevron had constructed structural supports and had placed certain vessels within those supports. Seeking to avoid further differences with EPA regarding interpretation of Rule 201, the District thereafter prepared a draft revised interpretation of the rule. The draft interpretation basically provides that:

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- A permit to construct is required prior to the commencement of construction of any support structure such as a building or scaffolding which is an integral part of the equipment which may emit or control air contaminants. "Integral part" is defined as a support which is affixed to the emitting equipment and is necessary for the equipment to practicably operate. Under this proposed interpretation, construction such as that carried out by Chevron prior to issuance of the District permit would in the future be prohibited.
- Foundations could be installed prior to the issuance of a permit to construct.
- On-site storage of a prefabricated piece of equipment would be allowed prior to issuance of a permit provided that the equipment is not permanently affixed and the procedure of making process or utility connections is not commenced.

This draft revised interpretation is founded on three basic factors: First, construction of foundations and structural supports which are not integrally related to emitting equipment cannot be considered construction of the equipment which "may cause the issuance of air contaminants" as described in Rule 201.¹ The brevity and simplicity of this rule's language clearly requires some interpretation to draw the line to define what activities constitute construction of the emitting equipment. We believe that our interpretation draws that line in a reasonable manner by excluding any foundations and non-integral structural supports so as to ensure that no unalterable commitment to a particular design of emitting or control equipment occurs prior to issuance of a permit to construct. Second, the District's interpretation is consistent with an EPA-approved SIP provision for South Coast, which exempts from permit requirements structural changes not affecting emissions. District Rule 219(a)(1). Third, there is no language in the rule which prohibits mere storage of prefabricated equipment.

Your staff commented that the District's draft revised interpretation is inconsistent with federal New Source Review regulations found at 40 CFR 51.165, and Prevention of Significant Deterioration regulations found at sections 51.166 and 52.21. These regulations define "begin actual construction" for purposes of federally-required permits. The federal definition includes more actions than those described in our draft revised interpretation, primarily installation of foundations and all structural supports. In addition, your staff did not agree with allowing on-site storage of prefabricated equipment. From a policy perspective, your staff was concerned that "putting equity on the ground" in the manner described in our draft revised interpretation could "seriously compromise the ability of permitting authorities to issue a post hoc permit that still fulfills the statutory purpose of new source review."

¹ District Rule 201 provides:

"A person shall not build, erect, install, alter or replace any equipment, the use of which may cause the issuance of air contaminants or the use of which may eliminate, reduce or control the issuance of air contaminants without first obtaining written authorization for such construction from the Executive Officer. A permit to construct shall remain in effect until the permit to operate the equipment for which the application was filed is granted or denied, or the application is canceled."

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As we described in the discussion accompanying our draft revised interpretation, the federal NSR regulations do not explicitly apply the definition of "begin actual construction" to establish the activities that cannot occur prior to issuance of a permit to construct. Your staff's position relies on prior EPA staff memoranda interpreting the above-referenced PSD regulations. These PSD provisions, however, do not apply to the District's nonattainment permitting program. In addition, even those prior EPA memoranda support the District's policy regarding on-site storage because they state that PSD regulates only changes of a "permanent nature" which are an "integral part" of a source; they state that on-site storage of equipment is allowed prior to issuance of a permit (March 28, 1986 memorandum to Robert R. DeSpain).

We do not suggest that your staff has taken an impermissible interpretation of the Clean Air Act or EPA regulations. We do believe, however, that the statute and regulations are far from clear and can be interpreted in more than one way. We believe that in such a situation the interpretation of a local regulation by its adopting and implementing authority can and should be accorded greater deference.

We particularly wish that you would consider the fact that the District's position is consistent with that of other local air pollution control agencies. We requested that CAPCOA distribute a survey to the California districts to determine their current practices in allowing preconstruction activities to occur prior to issuing a permit to construct. These activities included ordering of equipment, site clearing and grading, onsite equipment storage installation of foundations, paving, underground pipework, necessary plumbing and electrical installation, and construction of storage structures.

In total, 29 districts responded. For the 5 largest districts that responded, San Diego, South Coast, Bay Area, Ventura and San Joaquin, all would allow all types of preconstruction activities at the applicant's risk, if not an integral part of the equipment subject to permit, although most would not expressly authorize the construction. Overall, more than 70% of the districts would permit site clearing and grading and ordering materials, and half would allow the remaining activities. The most consistent comment received was that all activities were done at the applicant's own risk.

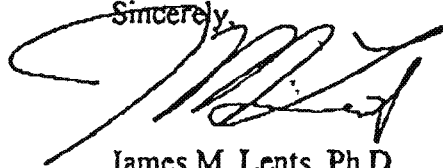
In summary, we believe that our interpretation --

- is consistent with the language of Rules 201 and 219 which were approved into the SIP and which apply to emitting equipment, not structures which do not affect emissions
- is based on a permissible interpretation of federal statutes and regulations
- prevents permanent commitment of resources to a particular design of emitting or control equipment prior to issuance of a permit, and thus avoids "putting equity on the ground" to an extent that might impact air permitting, and

- prevents unnecessary delay in project preparatory work, but ensures that all work prior to issuance of a permit is at the risk of the applicant.

For the above reasons, we request that you reconsider your staff's comment. Please call me or Peter Greenwald, District Counsel, at (909) 396-2303 if you have any questions or comments.

Sincerely,

A handwritten signature in dark ink, appearing to read 'J. Lents', written over the word 'Sincerely,'.

James M. Lents, Ph.D.
Executive Officer

PMG:je

(maC:cpa201-1)

cc: David P. Howekamp
Nancy J. Marvel